

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-220164

DATE: September 6, 1985

MATTER OF: Bay Cities Refuse Service, Inc.

DIGEST:

1. Allegation that low bidder will be unable to perform because of below-cost bid is a matter of responsibility. GAO does not review agency's affirmative responsibility determination in absence of a showing of possible fraud or bad faith, or that solicitation's definitive responsibility criteria were not met.
2. Under the Small Business Act, the Small Business Administration has conclusive authority to determine matters of small business size status for federal procurements, and therefore GAO will not consider an allegation that the low bidder is not a small business concern.
3. Submission of deduction schedule with bid where solicitation instructed that the schedule be submitted later does not make bid nonresponsive.

Bay Cities Refuse Service, Inc. protests the award of a contract to the apparent low bidder, San Jose Disposal, under invitation for bids (IFB) No. N62474-85-B-7580 issued by the Navy for refuse and trash collection services at Moffett Field, California. The protester contends that San Jose Disposal cannot satisfactorily perform the contract work at its bid price. The protester also argues that San Jose Disposal's bid should be rejected because that firm may not qualify as a small business and because, contrary to instructions, it submitted a schedule of deductions with its bid. We dismiss the protest.

Whether a low bidder can adequately perform a contract at the bid price is a matter of the bidder's responsibility. Prior to the award of this or any government contract, the contracting officer must make an affirmative determination of the offeror's responsibility.

Zimmerman Plumbing and Heating Co., B-211874, June 24, 1983, 83-2 CPD ¶ 16. Thus, Bay Cities' protest constitutes a challenge to the contracting agency's affirmative responsibility determination which our Office will not review absent a showing of possible fraud or bad faith on the part of contracting officials or an allegation that definitive responsibility criteria in the solicitation have not been met. Bid Protest Regulations, 4 C.F.R. § 21.3(f)(5) (1985); Chambers Consultants and Planners, B-217503, Feb. 5, 1985, 85-1 CPD ¶ 143. The protester did not allege either of these exceptions.

Bay Cities asserts that San Jose Disposal may not be a small business and therefore may be ineligible for any contract award under what we assume is a small business set-aside. Under the Small Business Act, 15 U.S.C. § 637(b)(6) (1982), the Small Business Administration has conclusive authority to determine matters of small business size status for federal procurements. Rut's Delivery Service, B-217286, Apr. 26, 1985, 85-1 CPD ¶ 474. Consequently, we do not review such matters. 4 C.F.R. § 21.3(f)(2).

Finally, the protester complains that San Jose Disposal has submitted its schedule of deductions even though the solicitation apparently instructed bidders that the schedule was to be submitted later. While we recognize that in many cases deduction schedules (used to penalize the contractor for inadequate performance) are to be submitted after award as a matter of contract performance, we do not believe that the early submission of the schedule with the bid would necessarily have any effect on the responsiveness of the bid. A bid need not be rejected as nonresponsive merely because it offers more than is required so long as the bid did not affect the government's right to award a contract consistent with the terms of the IFB and is not prejudicial to other bidders. Charles V. Clark Co., Inc., 59 Comp. Gen. 296 (1980), 80-1 CPD ¶ 194. The protester has made no such showing.

The protest is dismissed.



Ronald Berger
Deputy Associate
General Counsel